

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Apr 20, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHEAL HANLEY BAUSCH,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

NO: 2:18-CV-265-RMP

PROTECTIVE ORDER

BEFORE THE COURT is the parties' Stipulated Motion for Protective Order, ECF No. 48. Upon review of the stipulation and the record, the Court finds good cause, pursuant to Federal Rule of Civil Procedure 26(c), to **GRANT** the Motion at **ECF No. 48**. The Protective Order is set forth below.

PROTECTIVE ORDER

Under Rule 26(c) of the Federal Rules of Civil Procedure, a court, upon motion of a party and upon good cause shown, "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The Rule permits a court to order that "that the disclosure or

1 discovery may be had only on specified terms and conditions.” Fed. R. Civ. P.
2 26(c)(2). The Defendant United States requests this Protective Order pursuant to 5
3 U.S.C. § 552a(b)(11), to provide for the disclosure of personally identifying
4 information that is contained in certain federally assisted healthcare centers and/or
5 government documents, and which records and materials may be subject to disclosure
6 under Fed. R. Civ. P. 26.

7 The United States also seeks this protective order under Rule 26(c)(1)(B) for
8 the purpose of adequately protecting third party personal identifiable information (PII)
9 and the privacy interests in other non-party employees of federally assisted health care
10 centers and/or other government sensitive records, which contain confidential and/or
11 sensitive personal and personnel information of third party employees, including
12 education and medical background, and which are entitled to be protected and kept
13 confidential, and this order is needed to ensure that protection is afforded only to
14 material so entitled.

15 This Court has significant discretion in granting a protective order to prevent “a
16 party or [third party] person from annoyance, embarrassment, oppression, or undue
17 burden or expense.” Fed. R. Civ. P. 26(c); *See Gauthier v. Hoyer*, 52 Fed. Appx. 28, 29
18 (9th Cir. 2002). Here, nonparty employees would be subject to annoyance and
19 embarrassment if personnel files, credentialing files, Privacy Act protected information
20 and/or other personal and personnel information were openly or publicly revealed and
21 widely disseminated. *See also Travis v. Fluor Hanford, Inc.*, No. CV-06-5-17-LRS,

1 2007 WL 1074890, *1 (E.D. WA April 5, 2007) (granting a protective order,
2 preventing or limiting the production of confidential personnel information regarding
3 employees not a party to the plaintiffs action, except with regard to allegations of bias
4 and misconduct).

5 The United States asserts that absent a protective order, a violation of a non-
6 party's interests and/or the Privacy Act, which protects the privacy interests of non-
7 parties/ employees, could subject the involved government agency, sub-agency, entity
8 or sub-entity to potential civil liability under 5 U.S.C. § 552a(g). Because the Privacy
9 Act of third parties may be implicated here (i.e., deemed employees of federally
10 assistant health centers), and because the subject requested discovery documents
11 contain personally identifiable information of non-parties that may be prohibited from
12 disclosure to third parties under the Privacy Act and/or other privacy statutes,
13 regulations, laws or other governmental privileges, absent a waiver from each
14 individual, then, without conceding that point, Plaintiffs agree to the resolution of this
15 issue with the entry of this Protective Order.

16 Absent other applicable privileges, protected information may include, but is not
17 limited to the nonparties' names, ages, addresses, phone numbers, etc. Additionally, the
18 documents may contain information such as federal and state officers and agents'
19 names. The United States may redact personal identifying information (*inter alia*, non-
20 party family and extended family information) and may assert additional privileges, but
21 is not refusing to provide personnel and/or professional credential information. Rather,

1 the United States requests that these particularized subjects of information be marked as
2 confidential and used only for the purposes of this litigation, and thereafter be
3 destroyed. *See e.g., May v. Fedex Freight Southeast, Inc.*, Civil Action No. 07-660-B-
4 M2, 2009 WL 1605211, *3 (M.D. La June 8, 2009) (rejecting proposed protective order
5 deeming *all* nonparty personnel documents with PII “confidential”).

6 This Stipulated Protective Order (“Protective Order”) shall govern the treatment
7 and handling of all non-party personal identification information (PII), personal and
8 personnel records, which records and/or information are designated by the parties
9 and/or by the Court as containing *confidential* information, including, but not limited to,
10 records of non-party employees and/or agents of the federally assisted healthcare clinic,
11 HHS, HRSA, and/or the United States.

12 Therefore, in the interest of expediting the flow of discovery material between the
13 parties, and to help facilitate the prompt resolution of disputes over confidentiality, it is
14 pursuant to the court's authority under Fed. R. Civ. P. 26(c) and the Privacy Act, and
15 with the stipulation and consent of the parties, that the following Protective Order will
16 apply to appropriate records and information within personnel and/or credential files or
17 records produced by the United States in its discovery disclosures and responses:

18 1. Pursuant to 5 U.S.C. § 552a(b)(11), and subject to the conditions
19 described below, Defendant is authorized to release to Plaintiff’s counsel and counsel
20 for other parties certain government or public health clinic records, and information
21 containing what Defendant asserts is or may be Privacy Act and/or otherwise

1 protected personal personnel information of non-party individuals – government
2 employees. Without determining the issue, Defendant may disclose the information
3 contained within the government’s or its deemed public health clinic’s files and
4 records to Plaintiff’s counsel without obtaining prior written consent of each of the
5 individuals to whom the records pertain, and such authorized disclosure shall not
6 violate the Privacy Act. 5 U.S.C. § 552a(b)(11); *see also Gilbreath v. Guadalupe*
7 *Hosp. Foundation Inc.*, 5 F.3d 785, 791 (5th Cir. 1993);

8 2. Pursuant to Federal Rule of Civil Procedure 26(c)(1)(B), Defendant may
9 disclose documents and information to Plaintiff’s counsel that may be protected from
10 disclosure by an investigative or law enforcement agent or officer, without waiving
11 privileges outside of this litigation and/or to third parties;

12 3. The parties shall take reasonable and diligent steps to protect the privacy
13 interests of the subject third-party individuals referenced within the disclosed
14 discovery materials. Plaintiff’s and/or co-defendants’ counsel shall not copy or
15 disseminate any records and/or information marked “confidential and/or privileged,”
16 as provided by the Defendant United States, except as otherwise provided in this
17 Order or as otherwise permitted by the Court.

18 4. These documents shall be used by the parties only for purposes of
19 litigating this case, including any subsequent appeals. Persons receiving copies of
20 protected documents or the contents of protected documents subject to this Protective
21 Order shall not use such documents or other information for any other purpose.

1 5. At the conclusion of this litigation, including any subsequent appeals, the
2 parties' counsel will retrieve all copies of the documents that they have provided to
3 staff and/or experts, and will destroy the copies or return them to the U.S. Attorney's
4 Office for the Eastern District of Washington, in care of the assigned Assistant U.S.
5 Attorney or her/his designee. If the documents that are retrieved by counsel are
6 destroyed, counsel shall so notify the U.S. Attorney's designee in writing;

7 6. If the parties intend to file documents containing personally identifiable
8 information (PII) or privileged information or designated *confidential* information in
9 the Court file or plan to use them as exhibits to depositions, they shall take steps to
10 protect the privacy of the individuals identified in these records through redaction or
11 other means of suppressing PII or other confidential material. Defendant asserts this
12 is required by the U.S. District Court Eastern District of Washington, ECF
13 Administrative Procedures, § VI(C), Privacy Concerns (May 6, 2015) and Rule 5.2 of
14 the Federal Rules of Civil Procedure. Unless redacted, both parties shall protect the
15 "Privileged and/or Confidential" marked information by moving to file such
16 documents under seal. At that time, the Court will evaluate the documents under the
17 relevant Federal Rules and Ninth Circuit precedent to determine whether and to what
18 extent the documents should be sealed. *See* Fed. R. Civ. P. 26(c); Fed R. Civ. P. 5.2;
19 *Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172 (2006);

20 7. All information that is asserted by either party as privileged under the law
21 enforcement or other investigative privilege, the attorney work-product doctrine

1 and/or the attorney-client privilege, or other designated privilege, that is produced or
2 presented in this action only may be used by the parties, members of their legal teams
3 (i.e., lawyers, paralegals, investigators, support staff), and all persons retained by the
4 parties (i.e., outside investigators, consultants, expert witnesses), and only for the
5 purpose of litigating this litigation. Neither party shall disclose these materials or the
6 content of these materials to any other persons or agencies without prior Court order.
7 This Order shall continue in effect after the conclusion of the proceedings. Any
8 modification or vacating of this Order shall only be made upon notice to and an
9 opportunity to be heard from both parties.

10 8. Defendant and its officers, employees, or attorneys, shall not bear any
11 responsibility or liability for any unauthorized disclosure of any documents obtained
12 by Plaintiffs and/or their counsel, co-defendants and/or their counsel, under this
13 Protective Order, or of any information contained in such documents. Plaintiff shall
14 not bear any responsibility or liability for any unauthorized disclosure of any
15 documents obtained by Defendant's counsel under this Protective Order, or of any
16 information contained in such documents.

17 9. To the extent the United States' discovery disclosures may involve a
18 limited waiver of the agency investigative, law enforcement privilege, the attorney
19 work product doctrine, and/or the attorney-client privilege, a limited, restricted waiver
20 applies to material that may be relevant to the U.S. Attorney's Office, U.S. Department
21

1 of Justice or other criminal investigation (if any) and/or any referred cases involving the
2 issues alleged in this litigation.

3 10. All persons having access to confidential information made available
4 pursuant to this agreement shall agree not to make any use of said confidential
5 information except in connection with the above-captioned litigation and shall further
6 agree not to deliver or transfer said confidential information to any person not
7 previously authorized by the terms herein.

8 11. Counsel disclosing confidential information to any person or entity shall be
9 responsible for limiting distribution of the confidential information to those persons
10 who both: (1) have a need to know the information and (2) are authorized to receive the
11 information under this Protective Order. Counsel shall be prepared to account for the
12 disposition and use of the information under this Protective Order.

13 12. All copies of confidential information disclosed under this agreement shall
14 be subject to the same restrictions as imposed on the original information.

15 13. All documents, materials, and information designated as confidential and
16 disclosed to any person pursuant to this Protective Order shall remain in the possession
17 only of the attorneys, experts, or consultants to whom they are disclosed as provided by
18 the Protective Order. The parties or their attorneys may not retain any documents,
19 materials, or information designated as confidential pursuant to this Protective Order
20 after the conclusion of this litigation.
21

1 14. Documents, materials, and information designated as confidential pursuant
2 to this Order may be disclosed in regular proceedings of this Court and/or by agreement
3 of the attorneys until trial, at trial the Court shall determine whether the Order shall
4 remain in force. Exhibits, unless redacted, shall be marked “CONFIDENTIAL” and
5 shall be: a) filed as proposed sealed documents and accompanied by a motion to seal,
6 pursuant to this Order; b) designated as an Exhibit containing confidential material
7 subject to the Court’s Protective Order; and c) a copy of the exhibit shall be promptly
8 served upon opposing counsel in accordance with Rule 5 (i.e., emailing to ECF
9 registered account complies with requirement).

10 15. The confidential documents, materials, or information set forth to facilitate
11 discovery in this case may nonetheless be used at trial in accordance with the Court
12 Rules, the Rules of Evidence, the Local Rules, and applicable federal statutes and
13 regulations (i.e., Privacy Act, et al.). However, any party or interested third party may
14 apply to this Court for additional protection regarding the protected use at trial of any
15 discovery produced in this case. Such motions should be filed contemporaneous with
16 the parties’ respective *motions in limine*, but will nonetheless be handled on an
17 individual basis.

18 16. No further modification or amendment of this Protective Order is permitted
19 except by a writing signed by counsel for the parties and approved by the Court. The
20 parties hereto agree that it is unreasonable to rely on any oral modification or
21 amendment of this agreement.

